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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **BT North America Inc. Reply to Opposition to Petition for Reconsideration**
In the Matter of Direct Access to the INTELSAT System
Report and Order, IB Docket No.: 98-192 (released Sept. 16, 1999)

Dear Ms. Salas:

BT North America Inc., pursuant to section 1.429(g) of the Commission's Rules, 47 C.F.R. §1.429(g), hereby files an original and eleven copies of its Reply to Opposition to Petition for Reconsideration of the Commission's Report and Order in the above-captioned proceeding.

Please direct questions concerning this Petition to the undersigned at (202) 434-8873.

Respectfully submitted,

Kristen Neller Verderame
Director, US Regulation & Government Relations
BT North America Inc.

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List A B C D E

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	**IB Docket No. 98-192**
	)	**File No. 60-SAT-ISP-97**
Direct Access to the	)	
INTELSAT System	)	

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BT NORTH AMERICA INC. REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

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INTELSAT System	)	

BT NORTH AMERICA INC. REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

BT North America Inc. ("BTNA") hereby submits to the Federal Communications Commission ("FCC" or "Commission"), pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), its Reply to Opposition to Petition for Reconsideration filed by Comsat Corporation ("Comsat") on January 11, 2000.[1] BTNA filed a Petition for Reconsideration on November 8, 1999 seeking reconsideration of the Direct Access Order denying on foreign Signatories and their greater than fifty-percent owned affiliates (collectively, "foreign Signatories") the right to obtain direct access services from INTELSAT for services between the United States and any foreign country in which the Signatory uses fifty-percent or more of all INTELSAT capacity consumed in that country.[2]

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[1] *Opposition of Comsat Corporation to Petitions for Reconsideration*, IB Docket No. 98-192, No. 60-SAT-ISP-97, FCC 99-236 (Jan. 11, 2000) (*hereinafter "Opposition Comments*").

[2] *In the Matter of Direct Access to the INTELSAT System*, IB Docket No. 98-192, File No. 60-SAT-ISP-97, FCC 99-236 (released Sept. 16, 1999) at 40, ¶98 (hereinafter "*Direct Access Order*" or "*Order*").

I. INTRODUCTION AND SUMMARY

BTNA demonstrated in its Petition for Reconsideration that the "surprise" restriction the Commission placed on foreign Signatories is contrary to the public interest and unsupported by the evidence in the record or indeed any other reasoned analysis. Contrary to the Commission's assertions, granting direct access to foreign Signatories would not provide an incentive to lower the INTELSAT Utilization Charge ("IUC") rates to "uneconomically low levels." As BTNA explained, a number of foreign Signatories, which account for a substantial portion of INTELSAT votes, would incur a significant financial loss if access charges were lowered to "uneconomically low levels." It stands to reason then that these foreign Signatories would have a strong incentive to oppose any such lowering of IUCs. As a final matter, BTNA demonstrated that the Commission failed to provide the requisite notice and opportunity for comment when it adopted the foreign Signatory restriction in its Report and Order.

In its Opposition Comments, Comsat failed to rebut any of these demonstrations. Accordingly, BTNA respectfully requests that the Commission grant BTNA's Petition for Reconsideration, and remove the restriction it imposed on foreign Signatories in the Direct Access Order.

II. COMSAT FAILED TO REBUT BTNA'S DEMONSTRATION THAT FOREIGN SIGNATORIES WOULD NOT HAVE AN INCENTIVE TO SEEK LOWER IUCS

In its Petition for Reconsideration, BTNA demonstrated that no foreign Signatory has an incentive to develop their U.S. activities at artificially low prices, and that some foreign Signatories indeed have strong incentives to oppose such pricing.[3] Comsat failed to rebut any of these salient points.[4]

Comsat first contends that BTNA ignores "the benefits that foreign Signatories would reap" from lowered IUCs in the U.S. market. Indeed, there is nothing here to ignore: all U.S. users of direct access would pay the same price, thereby precluding any discriminatory benefit to foreign Signatories. Comsat further states that the "equality" of low IUC rates in the United States is largely irrelevant to most U.S. carriers. However, Comsat has acknowledged that all Level 3 direct access users, including U.S. carriers, would equally benefit from lower IUCs, stating ". . . all foreign Signatories (and, indeed, all Level 3 direct access users in the U.S.) might in fact be equally benefited vis-a-vis each other by lower IUCs (with respect to U.S. market entry) . . .")[5] Thus, as Comsat has conceded, direct access affords foreign Signatories no advantage relative to any other Level 3 user in the United States.[6]

Comsat further argues that foreign Signatories would gain an "unfair competitive advantage" against U.S. satellite service providers, such as Comsat, PanAmSat, Orion, and Columbia through lower IUCs. However, foreign Signatories would not be

[3] *Petition for Reconsideration* at 5-10.

[4] It is interesting to note that Comsat has significantly changed its theory of harm from that expressed in its original comments. *See Comments of Comsat Corporation*, IB Docket No. 98-192, No. 60-SAT-ISP-97, FCC 99-236 (Dec. 22, 1999) at 66-67. Originally, Comsat argued that U.S. international carriers would induce foreign Signatories to lower IUCs to below-cost levels and compensate the foreign Signatories for any losses that they might suffer. Comsat did not argue that direct access by foreign Signatories, but rather U.S. carriers, would cause harm to Comsat.

[5] *Opposition of Comsat Corporation to Petition for Waiver*, IB Docket No. 98-192, No. 60-SAT-ISP-97, FCC 99-236 (Dec. 6, 1999) at 5.

[6] It is significant to note the Comsat made no attempt to rebut the expert economic analysis in the *Preston Affidavit* submitted by BTNA in support of its *Petition for Reconsideration*.

competing with U.S. international satellite operators, but rather U.S. carriers, such as AT&T and MCI WorldCom, as well as the many other carriers who obtain Level 3 access and who also purchase space segment from PanAmSat and Orion.[7] Thus, this argument by Comsat simply makes no sense.

Next, Comsat contends that foreign Signatories will not be affected by lower IUCs in their home markets where Level 3 direct access is available because most Signatories "are still the dominant providers of telecommunications service" and "face only modest competition" from Level 3 users. These bald assertions are not supported by any evidence on the record, and cannot possibly be assumed to be true for all Signatories. Assuming *arguendo*, however, that Comsat's assertions are true, economic analysis still refutes Comsat's argument. If a Signatory were to provide a subsidy to Level 3 users in its home market, the "modest competitors" would be provided with a significant competitive advantage and opportunity to grow and compete with the larger operator, as would additional Level 3 entrants attracted by subsidized rates, all at the expense of the Signatory.[8]

Further, the assumption that the "dominant provider" could easily raise prices in the home market to offset losses from a lower IUC necessarily implies that there are

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[7] Comsat raised this same argument in the Waiver proceeding. For BTNA's discussion, *see Response to Opposition to Petition for Waiver*, IB Docket No. 98-192, No. 60-SAT-ISP-97, FCC 99-236 (Dec. 6, 1999) at 9.

[8] In its *Opposition Comments* at 8-9, n. 7, purports to provide an example of how a Signatory could offset losses from subsidies to Level 3 direct access users by gaining share in the U.S. market. However, Comsat fails to provide a meaningful comparison of the losses from subsidies with the profits gained in the U.S. market, rendering this example useless. A more complete analysis would show that foreign Signatories would also have to lower retail prices to end users in their own countries to meet competition from their subsidized Level 3 users or else suffer a significant erosion in market share and a growing aggregate subsidy to Level 3 users.

unexploited profits in that market. However, economic theory holds that a monopolist will exploit the market to gain the greatest extent of profits possible, and any "dominant provider" will have already exploited its monopoly position to the fullest extent possible. Moreover, due to the substantial liberalization that has occurred in telecommunications markets around the world, in many Signatory markets (including the U.K.) competition is fierce and would prevent the Signatory from raising its prices to compensate for losses from a lower IUC.[9]

Comsat also dismisses the value of Level 3 direct access in other markets, claiming incentives to oppose lower IUCs by Signatories in markets where Level 3 access is available would be "minimal at best." To the contrary, however, Level 3 direct access users account for a significant percentage of INTELSAT revenues and this percentage is growing rapidly.[10] To reduce the level of investment return on a significant percentage of total revenues would obviously have an important negative financial impact on foreign Signatories.

Comsat further argues that foreign Signatories "may be able to reduce IUCs on selective space segment services," specifically high-volume services, to further their efforts to compete in the U.S. market, while blocking Level 3 competitors in their home markets from the same benefits. This is a completely speculative argument without a shred of evidence to support it. Even if this pricing strategy were attempted, however, foreign Signatories would gain no competitive advantage over carriers in the U.S. market,

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[9] *See, e.g.*, *BT North America Inc. Petition for Waiver*, IB Docket No. 98-192, No. 60-SAT-ISP-97, FCC 99-236 (Nov. 18, 1999) at 5-14.

[10] *See Affidavit of John H. Preston*, IB Docket No. 98-192, No. 60-SAT-ISP-97, FCC 99-236 (Nov. 8, 1999) at 6 (*hereinafter "Preston Affidavit"*) for a discussion of the amount of Level 3 usage of INTELSAT.

which would be their only incentive for such a strategy in the first place. Clearly, this argument has no merit.

Comsat next attempts to downplay the significant fact that many Signatories have investment shares that exceed their utilization shares (a fact that would serve as a strong disincentive to advocate lower IUC rates) by claiming that such surplus ownership is voluntary and involves only a year-long commitment. While Signatory surplus investments are "voluntary" in the sense that most commercial transactions in a market economy are "voluntary," it would nonetheless be costly for Signatories to give up that investment, particularly in light of the impending privatization where investment shares will be crucial for maintaining a meaningful ownership position in the privatized organization.

Moreover, in order for a Signatory to find it in its interest to relinquish its excess investment, it would have to conclude that gains resulting from lowered IUCs would be significant enough to offset the Signatory's opportunity costs from not investing in excess shares. However, as BTNA has demonstrated, there are no potential competitive gains to Signatories from below-cost IUCs. In short, there are no plausible competitive or financial reasons derived from below-cost IUCs for a Signatory to forego an otherwise profitable excess investment share. Indeed, as noted above, strong <u>dis</u>incentives to shed investment exist in light of the impending privatization.

III. COMSAT FAILED TO REBUT BTNA'S DEMONSTRATION THAT A MAJORITY OF SIGNATORIES COULD NOT SUCCESSFULLY LOWER IUC RATES TO UNECONOMICALLY LOW LEVELS

BTNA demonstrated in its Petition for Reconsideration that it is improbable that a

Board of Governors' vote would approve uneconomically-priced IUCs.[11] Comsat failed even to respond to this argument in its Opposition Comments. Rather, it pointed out – incorrectly – that "only" those Signatories that offer Level 3 direct access in their home markets could be hurt by lowered IUCs. There are, in fact, a significant number of Signatories whose investment shares exceed their utilization shares and who would have the incentive to oppose lowered IUCs as well.[12]

As discussed fully in the Petition for Reconsideration, the distribution of investment shares strongly suggests that it would be unlikely that a sufficient number of votes could be obtained to lower IUCs to artificially low levels. Indeed, combined with the fundamental facts that no Signatory has an incentive to lower IUCs to develop a market position, and that Signatories in countries that account for a significant portion of INTELSAT votes have additional incentives to oppose the lowering of IUCs, it is clear that it would be extremely difficult, if not impossible, for a Signatory to achieve a successful vote for lower IUCs.

Moreover, Comsat and its own experts have stated that in practice only 27% to 30% of the voting ownership is needed to block a decision.[13] Based on this figure, it is even more improbable that a vote to achieve below-cost IUCs could be successful.

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[11] *See Petition for Reconsideration* at 10-13.

[12] Based on the investment and utilization share percentages as of March 1, 1999, 28 of the top 50 Signatories have investment shares exceeding utilization shares. These 28 countries account for 68.08% of total INTELSAT investment. *See Petition for Reconsideration* at 13.

[13] *See "An Economic Assessment of the Risks and Benefits of Direct Access to INTELSAT in the United States,"* by Green, Houthakker, and Pfeifenberger, of The Brattle Group, (Dec. 21, 1998) at 41: "Comsat has informed us that depending on the voting shares represented on the Board, the total ownership share required to block a decision (e.g., in pursuit of a U.S. government instruction) has tended to range in the recent past from 27 to 30 percent."

IV. COMSAT DID NOT MAKE ANY ATTEMPT TO REBUT BTNA'S DEMONSTRATION THAT REMOVAL OF THE FOREIGN SIGNATORY RESTRICTION WOULD BE IN THE PUBLIC INTEREST

BTNA showed in its Petition for Reconsideration that foreign Signatories do not pose undue competitive concerns for other U.S. direct access users, whether as U.S. market participants or otherwise, and, therefore, that open market opportunities for carriers affiliated with foreign Signatories is wholly consistent with Commission goals and the public interest.[14] It is not surprising that Comsat made no attempt whatsoever to rebut this showing. How could it? Open competition and increased choice for customers has been a cornerstone of Commission policy for decades. Accordingly, the Commission should recognize that the foreign Signatory restriction is not in the public interest, and that this is further ground for it to reconsider and remove this restriction.

V. COMSAT FAILED TO REBUT BTNA'S DEMONSTRATION THAT INADEQUATE NOTICE AND OPPORTUNITY FOR COMMENT WAS PROVIDED TO FOREIGN SIGNATORIES

In its Petition for Reconsideration, BTNA demonstrated that the FCC denied the public a fair hearing as to whether a foreign Signatory restriction is in the public interest, and the Commission denied itself the opportunity to receive informed comment on that important matter.[15] Comsat's Opposition Comments fail to rebut this demonstration.

It is clear that the Notice in this proceeding contains no proposal to restrict foreign Signatories from participating in direct access. Nor, contrary to Comsat's assertions,[16] is

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[14] *Petition for Reconsideration* at 14-15.

[15] *Petition for Reconsideration* at 3-5.

[16] Comsat's reference to BTNA's *ex parte* communications with the Commission on September 9, 1999 proves BTNA's argument. This was the first opportunity that BTNA had to address a foreign Signatory restriction because until this time it had not been aware that such a restriction was even being considered by the Commission. BTNA only

the restriction a "logical outgrowth" of proposals contained in the Notice. The FCC's simple statements that it was going to "take a broad look at Level 3 direct access options" and address "competitive concerns" cannot reasonably serve as notice for a particular restriction on foreign Signatories. If that were the case, one could argue that these broad statements provide "notice" for any and all possible issues arising out of direct access to INTELSAT, which is not only absurd, but places an enormous burden on parties to anticipate and address any conceivable scenario that the FCC might theoretically consider in its final rules.

Comsat's further contention that the Commission's intention to consider the impact of direct access on the U.S. objective of a privatized INTELSAT constitutes notice of the foreign Signatory restriction is equally inapposite.[17] The Commission's general comments in this regard provide no indication that it was considering instituting the foreign Signatory restriction it ultimately imposed. In fact, the FCC's discussion focuses on the potential for U.S. carriers and users "unaffiliated with INTELSAT Signatories" – specifically not foreign Signatories – to oppose INTELSAT privatization.[18] Finally, Comsat appears to have missed the Commission's clear finding

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learned of the FCC's consideration of such a restriction through press accounts at the very late date of September 8, 1999. The FCC adopted its Report and Order in this matter seven days later on September 15, 1999.

[17] Comsat's reference to pending legislation concerning INTELSAT privatization is self-serving and misleading. Numerous parties, including BTNA, have objected to the structure of the legislation because the issues of direct access and INTELSAT privatization are, in fact, separate issues that should not be linked. *See Testimony of Richard Vos, Head of International Satellite Consortia for BT, before the Committee on Commerce, Science, and Transportation, Subcommittee on Communications*, March 25, 1999 ("Direct access and privatization are separate issues and should not be tied together" (emphasis in original) ("Testimony of Richard Vos").

[18] *In the Matter of Direct Access to the INTELSAT System*, IB Docket No. 98-192, File No. 60-SAT-ISP-97, FCC 99-236 (released Oct. 28, 1998) at 30, ¶59. This is also

that there is no evidence on the record – indeed, record evidence contradicts – that direct access would negatively affect the privatization process.[19]

This unrebutted showing of lack of notice and opportunity for comment alone should prompt the Commission to grant BTNA's request for reconsideration.

VI. CONCLUSION

For the foregoing reasons, BTNA respectfully requests that the Commission reconsider and remove the restriction imposed in the Direct Access Order on foreign Signatories and their greater than fifty-percent owned affiliates, thereby allowing such parties to purchase direct access in the United States for service to or from any foreign country.

Respectfully submitted,

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restated in the *Order* at 56, ¶134: "{t}he record before us . . . provides no credible basis to conclude that permitting Level 3 direct access in the United States <u>to U.S. carriers and users unaffiliated with INTELSAT Signatories</u> will slow down or adversely affect the progress being made toward INTELSAT privatization" (emphasis added).

[19] *See Order* at 55-58. Comsat's reference to BTNA's May 3 *ex parte* letter is, again, misleading. The May 3 filing was merely a transmittal letter (with no text or discussion) to provide the FCC with a public document, the Testimony of Richard Vos.